STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE ARTHUR TULGETSKE,

Defendant-Appellant.

UNPUBLISHED
August 17, 1999

No. 205326
Presque Isle Circuit Court
LC No. 97-091614 FH

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of larceny in a building, MCL 750.360; MSA 28.592. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to five to fifteen years' imprisonment. Defendant appeals of right. We vacate defendant's conviction and remand for further proceedings.

Defendant was accused of taking a set of locking hubs for a four-wheel drive vehicle from the auto parts store where he was employed, selling them off the premises at an inflated price, and then keeping the money. According to defendant, he had previously sold parts in this manner and believed he was selling the parts as an employee of the store. And, although he failed to return the money to the store after the sale, he had fully intended to do so. He claimed his failure to return the money was due to the fact that he was laid off shortly after this incident and he was temporarily without funds. He asserted that his employer knew he had the parts.

Defendant first contends the trial court erred by failing to grant his motion for directed verdict. Defendant argues the element of intent to permanently deprive was not established beyond a reasonable doubt because the evidence showed that when defendant took the parts, he intended to conduct a normal sales transaction, and only after the sale did he decide to keep the money for himself. This argument is without merit.

This Court reviews a trial court's decision on a motion for directed verdict by considering the evidence presented up to the time the motion was made in a light most favorable to the prosecution and determining if a rational jury could find that the essential elements of the offense were proved beyond a

reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). Intent is a question of fact to be inferred from the circumstances by the jury. *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991). Minimal circumstantial evidence is sufficient to sustain a conclusion that a defendant entertained the requisite intent. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985). A defendant's intent can be disclosed by his declarations or his actions. *Id.*

The prosecution presented evidence that showed defendant volunteered to sell a set of locking hubs to Mike Crawford at "cost." The parts were taken from the store's inventory, but they were not properly recorded in the store's computer. Although the store's owner allowed defendant to buy parts for himself at dealer cost if he first obtained permission, the store's owner testified that defendant was not allowed to make a sale in the manner he used in this case. The store owner also testified that the price defendant charged Crawford, $70.00, was above both the retail price of the part and the dealer cost. Defendant did not charge sales tax on the sale and he did not give the buyer a proper store receipt; instead, he gave the buyer a handwritten note with the price and possibly his signature. Defendant did not return the money to the store, log in the sale, or inform the store owner of the transaction. Viewed in a light most favorable to the prosecution, this evidence was sufficient to establish defendant's intent to permanently deprive the owner of the auto parts and therefore to withstand defendant's motion for directed verdict.

Defendant alternatively argues that the evidence was insufficient to support his conviction. This Court applies the same standard of review for sufficiency claims as it does for claims regarding rulings on directed verdict motions. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992); *Peebles, supra* at 664. Defendant's sufficiency argument is premised on the acceptance of his own testimony as credible. The jury was free to accept this testimony, but it was not obliged to do so. *Wolfe, supra* at 519. Considering the evidence in a light most favorable to the prosecution, there was sufficient evidence to support the jury's verdict. *Id.* at 515.

Next, defendant argues the trial court erred when it refused his request to give the jury an instruction on the misdemeanor of embezzlement under $100, MCL 750.174; MSA 28.371.[1] We agree.

A court must instruct concerning a lesser included misdemeanor if (1) there is a proper request, (2) there is an "inherent relationship" between the greater and lesser offense, (3) the requested misdemeanor is supported by a "rational view" of the evidence, (4) the defendant has adequate notice, and (5) no undue confusion or other injustice would result. *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982); *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996). In this case, the trial court found the evidence did not support giving the embezzlement instruction and that the jury would be confused if it gave the embezzlement instruction.

The court erred in concluding that the third part of the *Stephens* test was not satisfied. The requested charge was supported by a "rational view" of the evidence. Defendant testified at trial that his job duties included "delivery of parts to the customers" and at the time he came into possession of the hubs, he had no intent to steal:

Q: You weren't, at the time you took them, intending to steal them?

A: No , sir.

* * *

Q: What were you intending to do with them at the time you took them?

A: Uh, sell them to Mr. Crawford and put the money into the business.

Q: What did you do then?

A: Uh, I didn't put the money in the business right away. I got laid off prior to it.

The jury could have believed defendant's testimony that he was permitted to take stock out of inventory, but disbelieved his testimony that at the time he sold the parts, he intended to pay the proceeds to the business but was later simply unable to do so.

Defendant does not have to concede guilt of the lesser offense to be entitled to the instruction.[2] What is required is that the charge be supported by a rational view of the evidence. Here a rational view of the evidence could support a finding that 1) the property belonged to a principal, 2) that defendant had a relationship of trust with the principal because the defendant was an agent, servant, or employee, 3) that defendant obtained possession or control of the property because of this relationship, 4) that defendant a) dishonestly disposed of the property, or b) converted the property to his own use; 5) that defendant did this without the principal's consent, 6) that at the time he disposed of the property, defendant intended to defraud or cheat the principal of the property, and 7) the property was valued under $100. CJI 27.1.

The jury was improperly denied the option of convicting defendant of the offense of embezzlement by an agent under $100. We therefore vacate defendant's conviction of larceny in a building, and remand for a new trial or entry of a conviction of embezzlement by agent, under $100, at the prosecutor's option. *People v Bryan*, 92 Mich App 208, 225-226; 284 NW2d 765 (1979).

In light of this disposition, we need not address defendant's remaining claims of sentencing error.

Defendant's conviction and sentence are vacated and the matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Helene N. White

[1] The Legislature has since amended the statute and changed the dollar value for misdemeanor and felony embezzlement. 1998 PA 312.

[2] We note, however, that in his opening statement, defense counsel argued that his client was not guilty of the crime of larceny in a building but, for practical purposes, conceded that defendant might be guilty of embezzlement under $100:

> Now, ladies and gentlemen, . . . I'm not going to get up here and say that Larry Tulgetske did no wrong in this case. He did. He did wrong things. *But he did not commit the crime of larceny in a building*. And that's what we're here to determine today, not whether he did wrong or not, but whether he committed the crime that he's charged with.
>
> The evidence will show the following: Mr. Tulgetske was employed by Gary Wilson, NAPA Auto Parts. . . . His job was to sell to customers.
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> * * *
>
> Mr. Crawford is going to tell you that he thought he was buying from NAPA, . . . *And Larry did do wrong; yes, he did. He put the money in his pocket, not in the till. If he did wrong, that is what he did wrong. It wasn't the taking of the item*. That was his duty. That was his job, selling items to customers, selling car parts.
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> * * *
>
> There was no intent to permanently deprive the owner of that item, the locking hubs. If he did anything wrong, it is stealing --- not stealing an item from the store, it's pocketing that money; betraying the trust that he had with the store owner, Gary Wilson. [Emphasis added.]